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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LARRY G. MERRILL,

11 Plaintiff,

12 v.

13 ICICLE SEAFOODS, INC.,

14 Defendant.

15 Case No. C04-1721L

16 ORDER GRANTING MOTION TO
17 CONTINUE AND GRANTING IN
18 PART MOTION TO BIFURCATE AND
19 PAY MAINTENANCE AND CURE

20 I. INTRODUCTION

21 This matter comes before the Court on plaintiff's motions to continue (Dkt. # 21-1) and
22 to bifurcate and pay maintenance and cure (Dkt. #24-1). Plaintiff has requested that the Court
23 bifurcate his claim under the Jones Act, 46 U.S.C. App. § 688, from his claim for maintenance
24 and cure because until such time as the plaintiff receives the cure to which he is entitled, the full
25 extent of his injury under the Jones Act cannot be known. Additionally, plaintiff asserts that he
26 is entitled to maintenance and cure under maritime law.

27 II. BACKGROUND

28 In December of 2002, plaintiff Larry Merrill worked for defendant Icicle Seafoods aboard
the vessel DISCOVERY STAR (the "vessel"). As part of his employment with defendant, Mr.

1 Merrill painted interior rooms aboard the vessel while it was docked in Seattle prior to a voyage.
2 There is a dispute between the parties as to whether the paint he used contained latex. It is
3 undisputed that Mr. Merrill was not using a respirator while he was painting.

4 On December 29, 2002, after he had been painting for some time, Mr. Merrill
5 experienced a headache, syncope (a lapse in consciousness), left-side numbness, and dizziness.
6 Plaintiff was taken to Harborview hospital in Seattle where he was evaluated and eventually
7 discharged with instructions to follow up with his primary care physician. No diagnosis was
8 reached.

9 Plaintiff returned to work aboard the vessel and set out for Adak, Alaska. On February
10 22, 2003, Mr. Merrill experienced another episode of indigestion-like symptoms, headache and
11 left-side numbness. This time he did not lose consciousness. He was seen at the Eastern
12 Aleutian Tribes Clinic and then flown to Anchorage for treatment at Providence Alaska Medical
13 Center. Again, no diagnosis was reached.

14 At deposition, plaintiff testified that he has suffered breathing/congestion problems,
15 headaches, and syncope since the December 29, 2002, event.

16 III. DISCUSSION

17 A. Bifurcation

18 Plaintiff argues that without a diagnosis there is no injury, and without an injury there is
19 no Jones Act claim. A Jones Act claim rests on the negligence of the seaman's employer.
20 California Home Brands, Inc. v. Ferriera, 871 F.2d 830 (9th Cir. 1989). Whether plaintiff will
21 prevail on his Jones Act claim depends on whether he can establish a causal relationship
22 between the painting aboard the vessel and his injury. In contrast, the duty to pay maintenance
23 and cure is not dependant on negligence or causation. Rather it is based on factors that can and
24 should be decided promptly. Accordingly, bifurcation is proper at this time.

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1 **B. Maintenance and Cure**

2 “From its dawn, the maritime law has recognized the seaman’s right to maintenance and
 3 cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or
 4 on land.” O’Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41-42 (1943).
 5 “Maintenance and cure is designed to provide a seaman with food and lodging when he becomes
 6 sick or injured in the ship’s service; and it extends during the period when he is incapacitated to
 7 do a seaman’s work and continues until he reaches maximum medical recovery.” Vaughan v.
 8 Atkinson, 369 U.S. 527, 531 (1962). Admiralty courts are liberal in interpreting this duty for the
 9 protection of seamen who are considered wards of the court. Id. at 531-32. Generally speaking,
 10 in order to be entitled to maintenance and cure, a seaman need only prove that his injury arose
 11 while he was serving the defendant’s vessel. Dragich v. Strika, 309 F.2d 161, 163 (9th Cir.
 12 1962). Despite the parties assertions in this case, it is not material whether plaintiff’s injury was
 13 caused by latex or any other paint fume-induced poisoning. Liner v. J.B. Talley & Co., Inc., 618
 14 F.2d 327 (5th Cir. 1980). All that matters is whether his illness or injury arose while he was in
 15 the service of the vessel.

16 Here, plaintiff has presented evidence that an illness or injury arose while he was in the
 17 service of the vessel. Both episodes occurred while plaintiff was an employee of defendant’s
 18 vessel at the end of 2002 and the beginning of 2003. Therefore, defendant owes the duty to pay
 19 maintenance and cure until such time as plaintiff has reached maximum medical recovery.
 20 “Maintenance” is a subsistence allowance designed to provide the seaman with compensation
 21 sufficient to pay for his food and lodging until the time of his maximum cure. Caufield v. AC &
 22 D Marine, Inc., 633 F.2d 1129 (5th Cir. 1981). “Cure” is the employer’s obligation to pay for
 23 medical expenses for sick or injured seamen. Vella v. Ford Motor Co., 421 U.S. 1 (1975).
 24 “Maximum medical recovery” is reached when a seaman’s condition is of a permanent character
 25 and/or will not improve with additional medical treatment. Crooks v. United States, 459 F.2d

1 631 (9th Cir. 1972). There is no duty to prepay for care. Dominguez v. Marine Transport
 2 Management Co., 1992 AMC 2863 (E.D. La. 1992). However, there is a duty to guarantee
 3 payment of reasonable medical treatment. Kezic v. Alaska Sea, 2004 AMC 2376, 2378 (W.D.
 4 Wash. 2004).

5 The fact that plaintiff fell ill while in the service of the vessel is undisputed. Defendant
 6 paid both maintenance and cure following the events of December 29, 2002 and February 22,
 7 2003, but there is no evidence that plaintiff has reached maximum medical recovery. There is a
 8 reasonable likelihood that further medical testing is necessary in order to determine whether
 9 plaintiff has, in fact, recovered. Defendant must therefore guarantee payment of plaintiff's
 10 medical expenses related to reasonable diagnostic testing.

11 As to payment of maintenance, plaintiff has not asked for any specific amount but rather
 12 requests defendant "re-institute maintenance payments to plaintiff as previously indicated."
 13 (Dkt. # 25-1). Defendant has not raised any legal or factual objection to continued maintenance
 14 payments except those related to causation/cure discussed above. Plaintiff's request for
 15 maintenance is therefore granted.

16 **C. Attorney's fees**

17 Lastly, plaintiff requests payment of attorney's fees. (Dkt. # 25-1). A defendant is liable
 18 for the attorney's fees and costs incurred to secure payment of maintenance and cure when the
 19 defendant's failure to provide payment was "arbitrary, recalcitrant or unreasonable."
 20 Kopczynski v. The Jacqueline, 742 F.2d 555, 559 (9th Cir. 1984) (citing Vaughan, Incandela v.
 21 American Dredging Co., 659 F.2d 11, 15 (2d Cir.1981), and Gaspard v. Taylor Diving &
 22 Salvage Co., 649 F.2d 372, 375 (5th Cir. 1981)). Here, there is no indication that defendant has
 23 acted arbitrarily or unreasonably, or been recalcitrant. Therefore, the Court DENIES plaintiff's
 24 request for attorney's fees.

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IV. CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiff's motion to bifurcate and pay maintenance and cure. (Dkt. # 24-1). Defendant shall reinstate maintenance payments, pay past medical expenses, and guarantee payment of plaintiff's future diagnostic and medical expenses until maximum medical cure is reached. The Court DENIES plaintiff's request for attorney's fees. A revised case management schedule will be issued for trial of plaintiff's Jones Act claim.

DATED this 23rd day of November, 2005.

Mrs Casnik

**Robert S. Lasnik
United States District Judge**

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